MISC. CRIMINAL APPLICATION NO. 2898 OF 1995.

Date of decision: 4.4.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. B.G. Jani, advocate for the petitioner.
Mr. K.J. Shethna, advocate for respondents No.1 to 12.
Mr. S.R. Divetia, A.P.P. for respondent No.3-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R. R. Jain, J.

April 4, 1996.

Oral judgment:

1. A case was registered against respondents Nos.1 to 12 and three others at Patan Police being I- C.R.No.76 of 1995 for offences punishable under Sections 323, 324, 325, 326, 307, 504, 506 (2), 34, 144, 147 and 149 of Indian Penal Code read with Section 25 (C) of the Arms Act and Section 135 of the Bombay Police Act. It is the allegation that three of the accused were armed with pistol, one with scythe and rest with stick and had assaulted the complainant as well as his relatives on 3.4.1995. During the course of investigation, the

respondents Nos.1 to 12 alongwith three others were arrested and were sent in judicial custody. The respondents Nos.1 to 12 alongwith three others preferred Criminal Misc. Application No.488 of 1995 under Section 439 of the Criminal Procedure Code ("Code" for short hereinafter) on 27.6.1995 and the same was heard on merits and rejected on 11.7.1995 as the learned Judge found that papers placed before him disclosed prima facie case as alleged in the FIR. At the time of filing of Criminal Misc. Application No.488 of 1995,i.e., on 27.6.1995, charge-sheet was not submitted. However, during the pendency, i.e., on 4.7.1995, charge-sheet was filed. Thus treating filing of charge-sheet as changed circumstance despite rejection of Criminal Misc. Application No.488 of 1995 the accused preferred another application being Criminal Misc. Application No. 625 of 1995 on 28.7.1995 before the same court. After hearing the learned advocates for the petitioner as well as the A.P.P., the learned Judge partly allowed the application. Application in relation to applicants No.1, 3 and 8 was dismissed whereas application qua rest of the applicants, i.e., the present respondents Nos.1 to 12 was allowed and each of the respondent was ordered to be enlarged on bail on furnishing surety of Rs.5,000/- and personal bond in the like sum. Being aggrieved by this order passed on 1.8.1995 enlarging the respondents No.1 to 12 on bail, the original complainant has preferred this petition under Section 439 (2) of the Code requesting for cancellation of bail.

2. On process being served, learned advocate Mr. K.J. Shethna has appeared on behalf of respondents No.1 to 12.

3. It is argued on behalf of the petitioner that earlier application for bail being Criminal Misc. Application No.488 of 1995 was rejected on merits on 11.7.1995 and the subsequent application was allowed within a very short time without any substantial change in circumstance. While disposing of both the applications, the learned Judge did hold that prima facie is made out against the respondents and yet the learned Judge has erroneously enlarged the respondents No.1 to 12 on bail. His contention that without any change in circumstance the subsequent application for bail is not paletable finds no force in view of the judgment in the case of J.S. Bhatt v. State of Gujarat, reported in XXXIII (2) G.L.R. 832, wherein this Court (Coram: B.C. Patel, J.) has upheld the right of accused to file fresh application for bail after charge-sheet is filed. In this case the charge-sheet was filed during pendency of

previous application which was dismissed on merits and, therefore, after the charge-sheet being submitted, subsequent application was filed. On the face of it, I do not find any illegality qua maintainability of second application. However, I may say that merely filing of charge-sheet shall not be a ground for enlarging any accused on bail since court has to consider entire matter on merits and if papers submitted with charge-sheet disclose any material or subsequent development, the court would be at liberty to discuss and deal with in accordance with law. Mr. Shethna, learned advocate for respondents No.1 to 12, has also argued that the complainant has no right to move application under Section 439 (2) of the Code for cancellation of bail as it is the paramount right of prosecution to request for cancellation, has also no merits in view of the judgment of this court (Coram: B.J. Shethna, J.) in Chandulal Lodhiya v. State, XXXIV (1) GLR, 596, wherein it has been held that though application for cancellation of bail can be filed by prosecution yet there is no express bar for moving such application by private party if State has not taken any action. The petitioner/complainant being the affected party, has right to move court for cancellation of bail.

3. It is true that while considering question of cancellation of bail, the court has not to pass any order in mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during trial. As observed by Supreme Court in the case of Dolat Ram v. State of Haryana, (1995) 1 SCC, 349, very cogent and overwhelming circumstance should only weigh the court for cancellation of bail. Similar view has also been taken by the Supreme Court in the case of Aslam Babalal Desai v. State of Maharashtra, AIR 1993 SC 1, holding that bail once granted can be cancelled only on the strength of cogent and concrete evidence and special reasons which are germane to cancellation. Therefore, while considering such question, it will have to be borne in mind that the petitioner knocking the door shall have to satisfy the court as to cogent, concrete and overwhelming circumstance and special reasons which are germane to cancellation else exercise of discretion would be jeopardising fundamental right to enjoy freedom.

4. As discussed above, in this case, prior to submission of charge-sheet the lower court had an occasion to look into the papers while deciding bail application being Criminal Misc. Application No.488 of

1995. The Court held that on the strength of material placed before him, prima facie case, as alleged in FIR, is made against respondents and, therefore, looking to the gravity of the offences, rejected the application. Of course, while considering successive application the papers submitted alongwith the charge-sheet were placed before the Court but no additional material other than what was placed and considered while deciding previous application was placed before the court. It is true that submission of charge-sheet gives right to accused for filing successive application for bail but that alone cannot be a ground for granting bail as the court has to consider on merits from the material placed/produced. The impugned order has been passed within a short period of 20 days. No change in circumstance has been shown except submitting charge-sheet. No additional material has been placed. The learned Judge also held that prima facie involvement of respondents including use of scythe is established. Despite this observation, a cursory observation is made that no prima facie case is made out against respondents and, therefore, they are eligible to get benefit of being set at liberty. As regards other three accused, a positive finding is given about their involvement, use of weapons and prima facie case under Section 307 and other sections referred to above. From the material placed before the court, admittedly it is revealed that there are more than 5 accused. The evidence is that all of them constituted unlawful assembly and committed crime as alleged by prosecution. Even the learned Judge also held so while deciding previous application. Now without any additional material and changed circumstance I find no reason for him to hold otherwise within a very short period of twenty days while deciding successive application. In my view, on the face of it, the finding of the learned Judge is perverse, unwarranted and illegal and in arbitrary exercise of discretion. Therefore, in my view, this ground alone is a cogent and overwhelming circumstance so as to interfere with the impugned order.

5. Mr. Shethna has argued that the petitioner has not been able to show any concrete evidence of violating freedom enjoyed by virtue of grant of bail. But from the affidavit filed by the present petitioner, it clearly transpires that the liberty has been misused and the respondents No.1 to 12 administer threats to the complainant as well as witnesses. In support of affidavit, the petitioner has also produced xerox copies of letters (complaints) written to the Chief Minister as well as District Superintendent of Police Patan. The petitioner further made allegations that the police has

also joined hands with respondents and has not paid any heed to his complaint and, therefore, the Investigating Officer was directed to file affidavit controverting this part of the allegation. From the affidavit filed by Mr. I.B. Chauhan, Police Sub Inspector, Patan Police Station, it amply becomes clear that on the strength of complaint filed by the petitioner appropriate actions were initiated against respondents No.1 to 12 for misusing the liberty and violating the conditions imposed by this court. Since this being a matter of documentary evidence, the respondents have no answer and, therefore, the fact that while being on bail the respondents No.1 to 12 indulged in activities prejudicial to the case of prosecution stands established. The respondents No.1 to 12 tried to administer threats to the witnesses with a view to tamper with evidence. In my view, this is an additional, cogent, concrete and overwhelming circumstance being germane for cancellation of bail. As a cardinal rule, no accused should try to tamper with prosecution evidence while being on bail. But in this case, as discussed above, the respondents No.1 to 12 while being on bail, have tried to tamper with prosecution evidence and, therefore, the circumstance has to be viewed seriously.

6. Mr. Shethna has also argued that since more than one year, the respondents No.1 to 12 are on bail and if now taken in custody, would be deprived of their fundamental right of freedom and liberty. It cannot be gainsaid that fundamental right of freedom and liberty guaranteed under the Constitution of India is always subject to restrictions. If a person is involved in any illegal or unlawful activity then the law permits his detention and such an endeavour cannot be in violation of fundamental rights. If a case for cancellation is made then despite having enjoyed liberty for more than one year the respondents can be taken into custody and the circumstance shall not operate as bar branding as injustice. However, the same is to be weighed against the basic principle of achieving harmony in the judicial system and creating judicial discipline. From the record it clearly transpires that on the strength of same material the learned Judge took quite contrary and inconsistent views in two different proceedings between the same parties and in relation to same subject matter and that too also within a short span of 20 days. I fail to understand what has weighed the learned Judge while holding so without any changed circumstance or additional evidence. This has to be viewed seriously and cannot be permitted to be perpetuated in subordinate judiciary as would result into judicial anarchy ultimately adversely

affecting the image of the institution and administration of justice.

7. While opposing this application, Mr. Shethna has also argued that three other accused who were not released on bail by lower court have now been released by this court. It is further argued that other accused who have now been released by this court are alleged to have committed graver offence than the present respondents No.1 to 12 and thus inviting my attention to the decision of the Supreme Court in the case of Hari Singh v. State of Haryana, AIR 1993 Supreme Court Weekly, 2357, it is argued that keeping in mind the basic principle of administration of courts, the courts of co-ordinate jurisdiction should have consistent opinions in respect of an identical set of facts or on question of law. It is true that if Courts express different opinions on the identical sets of facts or question of law while exercising the same jurisdiction, then instead of achieving harmony in the judicial system, it will lead to judicial anarchy. But the question is not with regard to grant of bail but cancellation of bail owing to subsequent developments or in application of law. While considering question of cancellation of bail, the additional factor to be borne in mind by the court is whether the liberty is misused and/or conditions imposed are violated. In this case, the affidavit filed by complainant supported by the affidavit of investigating officer is quite eloquent and operate against the respondents. Therefore, even if rest of the accused have been enlarged on bail by a court of concurrent jurisdiction, any order for cancellation of bail qua others will not be contrary to the basic principle of administration of court and maintaining judicial discipline.

8. In light of foregoing discussion, I hold that the petitioner has been successful in bringing on record cogent, concrete and overwhelming circumstance for cancellation of bail. The facts itself are eloquent and constitute special reason weighing the court to decide the matter against the respondents No.1 to 12.

9. Hence, the application is allowed. The impugned order dated 1.8.1995 passed by the learned Additional Sessions Judge, Mehsana, Camp at Patan, in Criminal Miscellaneous Application No.625 of 1995 granting bail to present respondents No. 1 to 12 is hereby set aside. Respondents No.1 to 12 herein are directed to surrender before the trial court on or before 10.5.1996, failing which the lower court shall be at liberty to proceed in

accordance with law. Rule is made absolute accordingly.